EDITOR'S NOTE

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No. 87-5620

IN THE

SUPREME COURT OF THE UNITED STATES

1987 TERM

PERRY HOO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ISSUE PRESENTED FOR REVIEW

Is the loss of the protective benefits of the Juvenile Delinquency Act as a result of readily avoidable preindictment delay a violation of due process?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE SECOND CIRCUIT

Petitioner Perry Hoo respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS OF THE COURTS BELOW

The opinion of the Second Circuit Court of Appeals was rendered on August 3, 1987. The opinion is reported at 825 F.2d 667. (A copy of the slip opinion is reproduced as Appendix A, infra, at pp. 1a - 10a).

The District Court's decision on the defendant's original motion was issued on April 11, 1986 under the caption United States v. Wai Ho Tsang and Perry Hoo. The Court's decision was reported at 632 F.Supp. 1336. (Appendix B, infra, at pp. 11a - 15a).

A hearing was held on April 25, 1986. Following the hearing the District Court made oral rulings as to findings of fact and the applicable law. (Appendix C, infra, at pp. 16a - 23a).

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on August 3, 1987. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States Constitution, states in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATUTES INVOLVED

The text of the Juvenile Delinquency Act, 18 U.S.C. §§5031-5042 (1982 & Supp. III 1985), is set forth in Appendix D, infra, pp. 24a - 29a.

STATEMENT OF THE CASE

Perry Hoo appeals from a judgment of conviction entered after his plea of guilty to racketeering and conspiracy to commit racketeering, 18 U.S.C. §§1961, 1962(c) and (d), under Counts One and Two of the indictment. The indictment originally named 25 individuals. Counts One and Two, the RICO and conspiracy to commit RICO counts, alleged 85 separate acts of racketeering. There were, in addition, 12 substantive counts. Hoo was named in 7 acts of racketeering and in one substantive count. In his plea he allocuted to involvement in gambling and extortion related acts of racketeering.

Hoo was sentenced on February 20, 1987 to a prison term of five and one half years. Hoo was continued on bail pending appeal to the United States Court of Appeals for the Second Circuit. He surrendered after the mandate was issued by that Court. Hoo is currently incarcerated on the judgment of conviction and sentence.

Subsequent to his indictment Hoo made a timely motion alleging, inter alia, that, because he was was under 18 years of age on the dates stated in all of the acts of racketeering and substantive counts in which he was named, his indictment 13 days after his twenty-first birthday

deprived him of the opportunity to utilize the provisions of the Juvenile Delinquency Act. 18 U.S.C. §§5031-5042 (1982 & Supp. III 1985) ["JDA"].* Hoo claimed this to be a substantial prejudice caused by readily avoidable preindictment delay, and therefore a violation of the protections of the Due Process Clause of the Fifth Amendment.

Pursuant to Hoo's motion the District Court ordered an evidentiary hearing on the circumstances of the delay in bringing the indictment. The hearing was held on April 14, 1986. The sole witness at the hearing was Nancy Ryan, an Assistant District Attorney in the office of the District Attorney of New York County and, pursuant to the

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* The Courts below deemed the Juvenile Delinquency Act to be inapplicable to any person indicted after his twenty-first birthday, even though the act was committed when that person was less than 18 years of age. In this determination the literal language of 18 U.S.C. §5031 pertaining to the definition of "juvenile" was applied. The United States Court of Appeals for the Second Circuit set forth the authorities for this interpretation in the decision of that Court. See Slip Op. at 4559-4561 (pp. 5a-7a, infra), 825 F.2d at 669-670. The defendant does not challenge that finding in this Court.

investigation of this case, an Acting Assistant United States Attorney. Ms. Ryan had, for some years, specialized in the prosecution of cases related to the Chinatown area of New York City.

Among the finding of facts made by the District Court at the conclusion of the hearing was a finding that Hoo, because he was not indicted until after his twenty-first birthday as result of the over two years spent in preindictment investigation, "had been substantially prejudiced by his inability to operate under the Juvenile Delinquency Act". The Court also found that this prejudice, "could, of course, ... have been prevented if it was necessary to do so, and it would not have been a difficult task to have done so, but the process would have required sealing and a whole host of different elements." Despite this finding the Court denied the defendant's motion because no intent by the Government to cause such harm had been proven*.

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* The defendant did not, and does not, allege any such conscious decision by the Government to obtain an advantage through deliberate delay.

Hoo's subsequent plea was entered pursuant to a plea agreement, Fed. R. Crim. P. 11(a)(2), in which the Government consented to the preservation of the issues pertaining to the JDA and to the Due Process Clause of the Fifth Amendment of the Constitution. In the agreement, the Government stipulated that although the Rico enterprise continued after Hoo's eighteenth birthday the Government was not prepared to offer evidence at trial of Hoo's participation in the enterprise, or of any acts of racketeering by Hoo, after Hoo's eighteenth birthday.

Preindictment Investigation:

A joint investigation by the New York County District Attorney's office and the office of the United States Attorney for the Southern District of New York into Chinese gangs began in April 1982. (H. 8).* The investigation focused on former members of a Chinese youth gang, known as the Ghost Shadows, suspected of having committed multiple acts of racketeering primarily in or involving the Mott Street area of Chinatown. Perry Hoo was from the early

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* "H." refers to the page of the transcript of the pretrial hearing of April 25, 1986.

stages of the joint investigation one of the individuals who was considered as a candidate for inclusion in any indictment that might be forthcoming. (H. 15, 21-22). Hoo was ultimately named in seven acts of racketeering and in Count Nine.

The Government attributed the delay in filing the indictment, until two weeks after Mr. Hoo turned 21, to the fact that a key witness to Hoo's involvement in act of racketeering 29 was only able to testify before the Grand Jury after this witness signed a cooperation agreement on December 13, 1984. Although act 29 contained the only allegation in the indictment that Hoo had an accessorial role in a homicide, Hoo was alleged in other acts of racketeering to have participated in robberies, conspiracy to murder, conspiracy to extort, extortion and gambling.

The cooperating witness whose testimony was required to establish Hoo's involvement in act of racketeering 29 had made known his inclination to implicate Hoo in this act as early as January of 1984. (H. 30). This was one of the first revelations of what testimony the witness was prepared to provide. (H. 47). It was during this same month that

the Government preliminarily concluded that Hoo would be named in the indictment. (H. 29).

The cooperating witness first entered into a debriefing agreement with the Government at the beginning of 1984. H. 15, 29). The Government did not negotiate a formal cooperation agreement with the witness because they hoped that through additional "pressure" they might obtain additional testimony from this individual. (H. 48-49). This pressure became available to the Government in September or October of 1984. (H. 28-29, 43). Discussions into the form of the cooperation agreement were entered into as early as September or October of 1984. (H. 29). However, it was not until as late as November of 1984 that the Government set a one week deadline for a decision from the potential witness as to whether he would execute the agreement. (H. 51). The proposed agreement was a "standard" form agreement which did not take long to prepare. (H. 52).

The witness met the deadline, the first imposed by the Government. After the agreement was reached in principle additional time was spent preparing the witness prior to his Grand Jury testimony. (H. 44-47). There was no testimony that this additional preparation materially affected the

Government's presentation. It was not until December 13, 1984, that the formal agreement was signed by the witness. (H. 16). The witness' testimony did not occur until still later in December.

Throughout the investigation the Government's only consideration as to time was that they meet their own self-imposed deadline of filing the indictment prior to the end of calendar year 1984. (H. 19, 33). The Government feared statute of limitation problems for some acts as to some defendants after that date. Ms. Ryan stated that but for this perceived problem the Government would have further delayed the filing of the indictment. (H. 33). The indictment in the case was returned on December 27, 1984, 13 days after Hoo's twenty-first birthday on December 14, 1984. The indictment, although filed on December 27, 1984, was in fact sealed until February 18, 1985. A superseding indictment was filed on April 8, 1986.

Government failure to consider impact of delay:

The Government conceded that it gave no consideration to the potential effect of any defendant's status as a juvenile until October, 1984. (H. 17, 20). Ms. Ryan testified that she had ready access to police records which

would have provided the birth date of the defendants from the earliest stages of the prosecution, (H. 21), and that such documentation was "easy" to obtain. (H. 22). Still, only in October of 1984 did anyone acting on behalf of the Government even assemble the necessary information regarding the ages of the defendants. (H. 38, 39). Ms. Ryan gave December 19, 1984 as the date on which she first realized that Perry Hoo would be 21 after December 13, 1984. (H. 38). The Government argued below that this lack of awareness on their part belied any claim of intentionally causing the prejudice that resulted and therefore precluded any claim for redress by the defendant.

REASONS FOR GRANTING THE WRIT

The Loss of The Protective Benefits of the Juvenile Delinquency Act as a Result of Readily Avoidable Preindictment Delay is a Violation of Due Process

This case presents clearly defined facts which offer the opportunity to squarely address a Constitutional issue, left unresolved by the leading cases of this Court, on which the United States Circuit Courts of Appeal are in marked conflict.

This Court has consistently ruled that while the Sixth Amendment and pertinent statutes of limitation provide the principal protection against prosecutorial delay, the Due Process Clause of the Fifth Amendment provides additional, albeit circumscribed, protection, where substantial prejudice is proven to have resulted from the delay. United States v. Lovasco, 431 U.S. 783 (1977), United States v. Marion, 404 U.S. 307 (1971). These cases established a two pronged test, requiring first that actual prejudice be proven to have been caused by the preindictment delay, and second, that some inappropriate governmental action have caused the delay. The exact standard to be applied to the Government on the second criteria, and which party bore the burden of proof, was not stated in either decision.

In Marion we conceded that we could not determine in the abstract the

> circumstances in which preaccusation delay would require dismissing prosecutions. 404 U.S. at 324. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases."

United States v. Lovasco, supra, 431 U.S. at 796-797.

The finding by the District Court, undisturbed by the Second Circuit, that substantial prejudice accrued to Hoo as a result of the delay presents an appropriate opportunity for a definitive determination of the issue of which standard should be applied to second prong.

Division in the Circuit Courts of Appeal:

The Second Circuit, in their decision below, held that "because appellant has made no showing of an improper prosecutorial motive, however, we find no deprivation of appellant's constitutional rights." Slip Op. at 4563, (p. 9a infra), 825 F.2d at 671. The standard applied thus imposed a requirement that even where prejudice caused by prosecutorial preindictment delay was established, the defendant could obtain redress only where a conscious motive

to harm the defendant on the part of the prosecution was proven.

The Circuits are divided as to whether only such intentional delay by the prosecution for the purpose of gaining a tactical or other advantage is actionable, or whether a balancing test should be employed in which more adverse weight is given to purposeful or reckless prosecutorial conduct but where even negligent conduct will be evaluated against the weight of the prejudice caused.

The balancing test where applied appropriately evaluates both the weight of the prejudice incurred and the degree of approbation which the prosecutorial conduct in each case warrants.

> The determination of whether a preindictment delay has violated due process is essentially decided under a balancing test, Lovasco, 431 U.S. at 790, United States v. Mays, 549 F.2d 670, 677, and we do not find that intent or reckless behavior by the Government is an essential ingredient in the mix. If mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater than that in cases where recklessness or intentional governmental conduct is alleged.

United States v. Moran, 759 F.2d 777, 782 (9th Cir. 1985).

> The Supreme Court's decisions in Marion and Lovasco may be read as establishing a two-pronged inquiry when preindictment delay is alleged to violate due process. First, a court must assess whether the defendant has suffered actual prejudice, and the burden of proving such prejudice is clearly on the defendant. If the threshold requirement of actual prejudice is met, the court must then consider the Government's reasons for the delay, balancing the prejudice to the defendant with the Government's justification for the delay.

United States v. Automated Medical Laboratories, Inc., 770 F.2d 339, 403-404 (4th Cir. 1985). In addition to the Ninth and Fourth Circuits the Eight Circuit also appears to uniformly apply the balancing standard. United States v. Taylor, 603 F.2d 732, 735 (8th Cir. 1979), cert. denied 444 U.S. 982 (1979).

One line of cases in both the Seventh and the Fifth Circuits apply the balancing test. "[T]he Court will . . . undertake a balancing of the reasons asserted by the Government against the prejudice alleged by the defendant when called upon to make the determination as to whether an indictment should be dismissed." United States v. Solomon, 688 F.2d 1171 (7th Cir. 1982). See also, United States v. Townley, 665 F.2d 579, 581-582 (5th Cir. 1985), cert. denied, 456 U.S. 1010, United States v. Williams, 738 F.2d 172, 175 (7th Cir. 1984). These two Circuits have developed

a second line of conflicting cases which require the defendant to meet a burden of proof to show that the prosecution intended to produce the harmful result. United States v. Watkins, 709 F.2d 475, 479 (7th Cir. 1986), United States v. Scott, 795 F.2d 1245, 1249 (5th Cir. 1986). This conflict remains unresolved in both Circuits. See, Dickerson v. State of Louisiana, 816 F.2d 220, 229 n.16 (5th Cir. 1987), United States v. Hollings, 811 F.2d 384, 387-388 (7th Cir. 1987).

The First, Tenth and Eleventh Circuits have adopted the rule applied below, where the requirement of proof of a prosecutorial intent to gain advantage was imposed. United States v. Lebron-Gonzalez, 816 F.2d 823, 831 (1st Cir. 1987), United States v. Jenkins, 701 F.2d 850, 854 (10th Cir. 1983), United States v. Caporale, 806 F.2d 1487, 1514 (11th Cir. 1986).

The balancing test would seem to be most consistent with the mandate in Lovasco that in considering the due process claim an evaluation should be made as to whether the governmental action complained of "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions'". 431 U.S. at 783,

citing Mooney v. Holohan, 294 U.S. 103, 112 (1935). Even the Government conceded in Lovasco that under certain circumstances a standard broader than that applied below would be appropriate. 431 U.S. at 795 n.17.

The prejudice caused was substantial, knowable and readily avoidable:

The District Court's finding that loss of standing under the Juvenile Delinquency Act constituted substantial prejudice was correct. Treatment under the JDA is an important and beneficial right. "A successful prosecution under the Act results not in conviction of a crime but rather in adjudication of a status." United States v. Frasquillo-Zomosa, 626 F.2d 99, 101 (9th Cir. 1980). Its provisions are thus clearly "protective". Id. at 102.

The Supreme Court, in Kent v. United States, 383 U.S. 541 (1966), has held that when the determination as to juvenile or adult prosecution is, by statute, to be made by a judicial officer, basic due process rights must be accorded to an eligible juvenile. The Court based its ruling on its determination that the issue of forum was, in this context, a "critically important question." 383 U.S. at 554. Such an opportunity for a judicial determination as

to the choice of forum is afforded to an eligible juvenile under the JDA even where an appropriate certification is made by the United States Attorney. 18 U.S.C. §5032. Denial of this right to a judicial determination by virtue of avoidable pretrial delay is as certain a violation of due process as if the statute permitted a judge to decide the issue without the standard, due process, procedural safeguards.

The Government could have prevented prejudice without jeopardizing the investigation:

The prejudice caused to the defendant in this case was not speculative in either its significance or as to the precise date on which the prejudice would be incurred. Because this investigation targeted a youth gang it is inexplicable that the Government did not even accumulate the easily obtained information as to the age of each defendant. This information would have, after the most simple of arithmetic calculations, established the date by which each defendant would lose the potential protection of the Juvenile Delinquency Act. The Government then could have made the proper determination of whether advancing their target date for filing the indictment would in any way have

prejudiced those investigatory functions recognized by this Court to be appropriate reasons for delay.

The record below establishes that the burden which the Government would have had to assume to prevent the loss by Hoo of the opportunity to be accorded the protective features of the Juvenile Delinquency Act was minimal. In the first instance, it defies realistic evaluation of the testimony at the hearing to conclude that even with an investigation this complex that had the Government been mindful of the potential harm to Mr. Hoo they could not have assigned to themselves, and met, a December 13, 1984, deadline rather than the self-imposed deadline of December 27, 1984.* However, even were that found not to be the case, with a minimal effort the Government could have used frequently employed procedural devices to prevent prejudice to Hoo by virtue of preindictment delay of over four years. For instance, an indictment naming Hoo and any other

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* The concession at the hearing that the Government would have delayed beyond December 31, 1984 had they not feared a statute of limitation problem reveals the flexibility they in fact had in determining when, in the late stages of the investigation, they would finally take their case to the Grand Jury.

defendant the Government cared to include could have been voted, filed and sealed. A superseding indictment could then have been issued and made public. It would seem to be of some significance that the Government did use such devices in this prosecution when they chose to do so.

The Government's position below that they were under no burden to take steps to protect Hoo's right, even where those steps in no way compromised the integrity of the investigation, is not sustainable. No decision places mere governmental convenience above substantive rights of an accused person. The Supreme Court should avail itself of this opportunity to establish whether there are any circumstances in which Governmental conduct or misconduct that falls short of causing intentional harm violates basic due process principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
October 1, 1987

Respectfully submitted,

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APPENDIX

Appendix A

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1239—August Term, 1986

(Argued: June 3, 1987 Decided: August 3, 1987)

Docket No. 87-1108

UNITED STATES OF AMERICA,

Appellee,

—v.—

PERRY HOO,

Defendant-Appellant.

Before:

NEWMAN and WINTER, *Circuit Judges,*
and BONSAL,* *Senior District Judge.*

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) following the entry of a conditional guilty plea to RICO charges. Because we hold

* The Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

that the appellant's rights under the Federal Juvenile Delinquency Act and due process clause were not violated by preindictment delay, we affirm.

DANIEL NOBEL, New York, New York, *for Defendant-Appellant*.

STEVEN A. STANDIFORD, Assistant United States Attorney for the Southern District of New York, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Bruce A. Green, Assistant United States Attorney, Nancy E. Ryan, Special Assistant United States Attorney, of counsel), *for Appellee*.

WINTER, *Circuit Judge*:

Two weeks after his twenty-first birthday, Perry Hoo was indicted for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, 1962(c)-(d) (1982). Hoo moved to dismiss the indictment on the ground that the government's delay in filing it denied him the protections afforded juveniles under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (1982 & Supp. III 1985) and his rights under the due process clause of the fifth amendment. Judge Sweet denied the motion. Hoo subsequently entered a conditional plea of guilty to the RICO charges but re-

served the right to appeal from the denial of his motion. We affirm.

BACKGROUND

On December 27, 1984, the government filed an indictment charging Hoo and twenty-four other defendants with operating as a RICO enterprise a youth gang known as the "Ghost Shadows." All twenty-five defendants were charged with at least one act of racketeering involving either murder or conspiracy to commit murder. Hoo was charged with seven acts of racketeering that involved gambling, conspiracy to commit extortion, extortion, conspiracy to commit robbery, robbery, conspiracy to commit murder, attempted murder and murder. All of these crimes allegedly occurred during his teenage years, and the government conceded in Hoo's plea agreement that it possessed no evidence that Hoo had participated in the racketeering enterprise between his eighteenth birthday and the end of the period covered by the indictment. Accordingly, had the indictment against Hoo been filed before his twenty-first birthday—December 14, 1984—Hoo would have been entitled to the protection of the Juvenile Delinquency Act. *See* 18 U.S.C. §§ 5031-5042 (1982). Instead, however, the indictment was filed on December 27, 1984.

On January 2, 1986, Hoo moved to dismiss the indictment against him. He claimed, *inter alia*, that the government's delay in filing the indictment was prejudicial and violative of due process because it had caused him to lose procedural rights under the JDA. The district court held that Hoo did not have an absolute right to the procedural protections of the JDA because the statute did not require

that prosecutions for acts of juvenile delinquency be initiated before the defendant's twenty-first birthday. *United States v. Wai Ho Tsang*, 632 F. Supp. 1336, 1339 (S.D.N.Y. 1986). Nevertheless, the court held that "were it to be established that the delay was due to 'unjustifiable Government conduct,' . . . or illegitimate prosecutorial motives," the preindictment delay would constitute a violation of Hoo's due process rights. *Id.* (citations omitted).

Accordingly, the court held a hearing to determine the reasons for government's delay in filing the indictment. The sole witness, Special Assistant United States Attorney Nancy E. Ryan, testified that the government had begun its investigation of the Ghost Shadows in April 1982 and had begun presenting evidence to a federal grand jury in January 1984. She also stated that from the outset of its investigation, the government had been aware of Hoo's criminal activities. Nevertheless, she testified that the government had been unable to obtain "the most important evidence against him"—evidence of Hoo's participation in the murder of Puk Chui—until December 13, 1984, the day before Hoo's twenty-first birthday. She further testified that, although she had at one point discussed with other prosecutors the general effect that the Juvenile Delinquency Act might have on the case, she did not realize until approximately December 19, 1984 that Hoo had just reached the age of twenty-one. Finally, she stated that the government had not sought a tactical advantage over Hoo by delaying the filing of the indictment.

After the hearing, Judge Sweet concluded that the government had engaged in "entirely appropriate investigatory conduct." In particular, he concluded that evi-

dence of the murder of Puk Chui was "a significant part of the government's case," and that the government had not obtained detailed evidence about the murder until the day before Hoo's twenty-first birthday, when an important witness had agreed to cooperate with the government and had testified about the murder before the grand jury. Judge Sweet also found that "[a]t no time during this period in late 1984 was there any consideration given to the effect of an indictment on Hoo's [juvenile] status." Accordingly, the court denied Hoo's motion to dismiss the indictment.

DISCUSSION

As amended in 1974, the Federal Juvenile Delinquency Act establishes certain procedural protections for juveniles, enumerated in the margin,[1] that may remove them

1 The Act sets forth, *inter alia*, the prerequisites for the exercise of federal jurisdiction over juvenile defendants, standards governing the disposition of juveniles found to be delinquent and the procedures for the transfer of juveniles to adult status. Specifically, a juvenile alleged to have committed an act of juvenile delinquency may not be prosecuted in a federal district court unless the Attorney General certifies to the court that (1) state courts either do not have, or will refuse to exercise, jurisdiction over the juvenile; (2) the appropriate state does not have "available programs and services adequate for the needs of juveniles"; or (3) the offense charged is a "crime of violence that is a felony," or is one of several specifically enumerated narcotics-related offenses. 18 U.S.C. § 5032 (Supp. III 1985). The Act also provides that a juvenile who is adjudicated to be a delinquent may be placed on probation or may be committed to the custody of the Attorney General, 18 U.S.C. § 5037 (1982), but may not be "placed or retained in an adult jail or correctional institution." 18 U.S.C. § 5039 (1982). When a juvenile who is not a previous offender is alleged to have committed a violent felony or one of several specified narcotics-related offenses, the Attorney General may make a motion to transfer the juvenile to adult proceedings. This motion may be granted if the

from the ordinary criminal justice system and place them in a separate scheme of treatment and rehabilitation. The Act applies only to the prosecution of "juveniles" who are charged with having committed acts of "juvenile delinquency." *See* 18 U.S.C. § 5032 (Supp. III 1985). The terms "juvenile" and "juvenile delinquency" are defined in 18 U.S.C. § 5031 (1982), which provides that

> [f]or the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, *or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday*, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

(emphasis added).

In applying Section 5031, the courts have consistently held that a defendant who is alleged to have committed a crime before his eighteenth birthday may not invoke the protection of the Juvenile Delinquency Act if criminal proceedings begin after the defendant reaches the age of twenty-one. *See, e.g., In re Martin*, 788 F.2d 696, 697-98 (11th Cir. 1986); *United States v. Araiza-Valdez*, 713 F.2d 430, 432-33 (9th Cir. 1983); *United States v. Doe*, 631 F.2d 110, 112-13 (9th Cir. 1980). Appellant nevertheless argues that we should construe the statute to extend its protection to defendants who could have been prosecuted

district court "finds, after hearing, [that] such transfer would be in the interest of justice" given, among other things, the juvenile's age, background and maturity. 18 U.S.C. § 5032 (Supp. III 1985). For certain previous offenders, however, transfer is automatic. *Id.*

earlier but, through no fault of their own, are indicted after their twenty-first birthdays. We disagree.

Appellant's proposed interpretation of the Juvenile Delinquency Act would render virtually meaningless the portion of Section 5031 that defines "a 'juvenile' . . . for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency," as "a person who has not attained his twenty-first birthday." For this language to be given any effect, Section 5031 must be interpreted at least to require that the statute's provisions apply only to criminal proceedings that begin before the defendant reaches the age of twenty-one. Thus, Judge Sweet was clearly correct in holding that the provisions of the Juvenile Delinquency Act were not available to Hoo.

Appellant nevertheless contends that this interpretation of the Juvenile Delinquency Act violates the due process clause of the fifth amendment because it allows prosecutors to deprive defendants of the statutory right to a judicial determination as to whether juvenile proceedings should be required, *see supra* note 1, without due process of law. Relying on *Kent v. United States*, 383 U.S. 541 (1966), appellant contends that the prosecutor's discretionary determination of the timing of the indictment (and thus the procedures to be accorded the defendant) should be subject to a hearing that comports with minimal standards of due process.

Appellant's reliance on *Kent* is misplaced. *Kent* involved a provision of District of Columbia law that permitted the Juvenile Court of the District of Columbia, "after full investigation," to waive its jurisdiction in favor of an ordinary trial before the United States District Court. *Id.* at 547. The Court held that the statute, "read

in the context of constitutional principles," required the juvenile court, in deciding whether to waive its jurisdiction, to conduct a hearing and to explain its decision. The instant case, in contrast, involves not a judicial determination but instead the timing of a decision to prosecute. Unlike the judicial determination in *Kent*, the broad discretion of prosecutors has been rarely subject to judicial review. *See, e.g., Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

A similar argument was rejected in *United States v. Bland*, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973), in which a juvenile defendant challenged the constitutionality of a provision of the District of Columbia Code that excluded from juvenile treatment individuals between the ages of sixteen and eighteen who were charged with certain crimes by the United States Attorney. The statute, in effect, linked juvenile status to the prosecutor's discretionary decision as to what charges to bring. In a claim that a hearing was necessary before the exercise of that discretion, the court observed:

> The District Court and appellee in the case at bar point to the acknowledged significant effect of the United States Attorney's decision whether to charge an individual 16 years of age or older with certain enumerated offenses, and conclude that, in the absence of a hearing, due process is violated when such a decision is made. This, however, overlooks the significance of a variety of other common prosecutorial decisions, e.g., whether to charge one person but not another possible codefendant; whether to charge an individual with a misdemeanor or a felony; etc. Furthermore, the decision whether to charge an individual with a misdemeanor or a felony has long

> determined the court in which that person will be tried. We cannot accept the hitherto unaccepted argument that due process requires an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom. Grave consequences have always flowed from this, but never has a hearing been required.

Id. at 1336-37. Similarly, we believe that the due process clause does not require that decisions to prosecute be subjected to pre-indictment judicial inquiry simply because the timing of the decision affects the availability of juvenile procedures.

Relying on cases involving prejudice caused by preindictment delay, appellant also contends that his right to due process was violated because the government, with "minimal effort," could have prevented him from suffering significant harm by filing its indictment only two weeks earlier. Because appellant has made no showing of an improper prosecutorial motive, however, we find no deprivation of appellant's constitutional rights.

In *United States v. Marion*, 404 U.S. 307 (1971), the Supreme Court held that the due process clause requires the dismissal of an indictment because of preindictment delay only when the delay causes "substantial prejudice" to the defense and the delay is an "intentional device to gain tactical advantage over the accused." *Id.* at 324. The reasons for placing such a heavy burden upon defendants are readily apparent. A rule such as that proposed by appellant—requiring in essence that prosecutors bring charges against twenty-year-olds as soon as they are able to do so—would "pressure prosecutors into resolving doubtful cases in favor of early—and possibly unwarranted—prosecutions." *United States v. Lovasco*,

431 U.S. 783, 793 (1977). Moreover, such a rule would needlessly encourage "multiple trials" in cases, such as this one, that involve more than one defendant or more than one crime. *Id.* In any event, appellant has failed to show that the government had improperly delayed his prosecution in order to gain a tactical advantage. Indeed, he does not contest the district court's conclusion that the prosecution had given no thought to the effect of the calendar upon Hoo's statutory rights. As the district court noted, the delay in filing the indictment was due entirely to legitimate considerations, such as the need to obtain evidence and the difficulties that necessarily arise in a complex RICO investigation. Accordingly, Judge Sweet quite properly refused to dismiss the indictment against Hoo.

Affirmed.

Appendix B

Opinion of the United States District Court for the Southern Distric

UNITED STATES of America,

v.

WAI HO TSANG, and Perry Hoo, Defendants.

No. 84 Cr. 1025 (RWS).

United States District Court, S.D. New York.

April 11, 1986.

In a RICO prosecution, one defendant moved to strike the indictment against him while another moved for suppression of certain identification evidence. The District Court, Sweet, J., held that: (1) a RICO prosecution could be based on acts committed by the defendant prior to the age when he could be charged and punished by imprisonment under New York law; (2) preindictment delay, which resulted in defendant's change in status from a juvenile to an adult offender, would violate the due process clause if it were established that the delay was due to unjustifiable government conduct or illegitimate prosecutorial motives; and (3) use of mug shots in an identification procedure was not unduly suggestive.

Motions denied pending further hearings.

1. Commerce ⇐82.73

A defendant may not defend a RICO prosecution based on an alleged failure to adhere to all of the particular elements of state law which a defendant could invoke in a state prosecution; instead, a federal court may only look to state law to determine whether the conduct is punishable by more than one year imprisonment, not whether the particular defendant may be punished for the conduct. 18 U.S.C.A. § 1961 et seq.

2. Commerce ⇐82.73

A RICO prosecution could be based on acts committed by the defendant prior to the age when he could be charged and punished by imprisonment under New York law. 18 U.S.C.A. § 1961 et seq.; N.Y. McKinney's Penal Law § 30.00; N.Y.Family Court Act, § 353.3.

3. Infants ⇐68.5

Defendant was no longer subject to the protections of Federal Juvenile Delinquency Act after his 21st birthday and therefore could be prosecuted in federal court based on alleged criminal acts committed prior to his 18th birthday. 18 U.S.C.A. §§ 5031-5042.

4. Indictment and Information ⇐7

A claim of prejudicial preindictment delay is based on considerations of due process and is applicable where defendant has demonstrated purposeful delay by the prosecutor resulting in actual prejudice to the defendant's ability to obtain a fair trial. U.S.C.A. Const.Amend. 14.

5. Constitutional Law ⇐265

Preindictment delay, which resulted in defendant's change in status from a juvenile to an adult offender, would violate the due process clause if it were established that the delay was due to unjustifiable government conduct or illegitimate prosecutorial motives. U.S.C.A. Const.Amend. 14.

6. Criminal Law ⇐339.7(4)

Use of mug shots in an identification procedure was not unduly suggestive.

Rudolph W. Giuliani, U.S. Atty., S.D. N.Y., New York City, for U.S.; Steven A. Standiford, Asst. U.S. Atty., Nancy Ryan, Special Asst. U.S. Atty., of counsel.

Roger Schwarz, New York City, for defendant Wai Ho Tsang.

Daniel Noble, New York City, for defendant Perry Hoo.

OPINION

SWEET, District Judge.

Pretrial motions in this 25-defendant RICO prosecution have been brought by

Perry Hoo ("Hoo") and Wai Ho Tsang ("Tsang"). A factual description of the underlying indictment is set forth in this court's opinion of December 24, 1986, familiarity with which is assumed. In these motions, Hoo moves to strike the indictment against him for failure to allege acts of racketeering which are chargeable under state law, for lack of adult criminal jurisdiction and for prejudicial preindictment delay. Tsang has moved for the suppression of certain identification evidence. For the reasons set forth below, Hoo's motion will be denied except insofar as its requests a hearing on the issue of preindictment delay and Tsang's motion will be denied pending a hearing at the time of trial.

I. *Motion of Perry Hoo*

Hoo is charged with seven acts of racketeering in connection with his indictment on both a substantive and conspiracy count of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"). He is also charged with an independent count alleging obstruction of interstate commerce by robbery. The acts of racketeering are each based on violations of state law and include conspiracy to extort property and extortion; operation of a gambling business; conspiracy to rob and robbery, and conspiracy to murder, attempted murder and murder.

Hoo was born on December 14, 1963 and the predicate acts are alleged to have occurred from 1977 through 1982. Therefore, several of the acts are predicated on criminal conduct by Hoo when he was only 15, 16, and 17 years old. Hoo asserts that, due to his young age at the time of committing these acts, he either could not have been prosecuted as an adult under New York law or would have been entitled to judicial review of his status before being prosecuted as an adult, and therefore these acts do not constitute acts of racketeering within the meaning of RICO.

Title 18, Section 1961(1)(A) of the United States Code, defines racketeering activity to include "any act ... chargeable under state law and punishable by imprisonment for more than one year." There is no question that the conduct charged in each of the acts specified against Hoo constitute crimes punishable in New York by imprisonment for more than one year. However, Hoo argues that under the law of New York, he in particular could not have been charged and punished by imprisonment because of his juvenile status at the time he committed these acts. As pointed out by Hoo, the New York State Family Court Act provides not for "imprisonment," but merely for "placement" of those juveniles found to be delinquent. N.Y.Fam.Ct. Act § 353.-3. *See also United States v. Gonzalez-Cervantes*, 668 F.2d 1073, 1076 (9th Cir. 1981) ("Adjudication of juvenile delinquency is not a conviction of a crime, but rather, a determination of a juvenile's status.")

New York law provides that, except for certain specified offenses, a person less than sixteen years old is not criminally responsible for his conduct. N.Y. Penal Law § 30.00. Lack of criminal responsibility by reason of infancy must be raised by the defendant as a defense to a prosecution. Hoo argues that the predicate acts charging him with conspiracy, extortion, and perhaps robbery are insufficient since he could not be held criminally responsible for those acts under New York law.

In addition, Hoo claims that with regard to the other predicate acts alleging criminal conduct before he became 18 years old, New York law would provide him with the opportunity to seek removal of an indictment to family court for proceedings as a juvenile delinquent rather than as an adult offender. Without having been afforded the opportunity to seek this judicial review, Hoo asserts that state law does not conclusively require "imprisonment" under the definition provided by RICO for these acts of racketeering.

While Hoo has raised issues that might seriously challenge a New York state court prosecution for the acts described above, the most recent interpretations of RICO establish that such state law defenses and procedural requirements are not incorporated into the federal statute. The Second Circuit has conclusively stated that:

> We are satisfied that Congress did not intend to incorporate the various state's procedural and evidentiary rules into the RICO statute. The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge.

United States v. Paone, 782 F.2d 386, 393 (2d Cir.1986). In reaching the conclusion stated above, the court dismissed the defendants' claim that he could not be charged under the federal RICO statute since New York law barred conviction of certain offenses without corroboration of accomplice testimony. Other circuits have reached similar conclusions that state law restrictions on evidence and punishment are not relevant to a federal prosecution based on predicate acts chargeable under state law. *See, e.g., United States v. Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977); *United States v. Licavoli*, 725 F.2d 1040, 1047 (6th Cir.1984).

[1, 2] Under these decisions, a defendant may not defend a RICO prosecution based on an alleged failure to adhere to all of particular elements of state law which a defendant could invoke in a state prosecution. Instead, a federal court may only look to state law to determine whether the conduct is punishable by more than one year, not whether this particular defendant may be punished for the conduct. Given this restriction on the incorporation of state law in a federal RICO prosecution, Hoo's motion for dismissal must be denied since it is premised on state law defenses and procedural remedies not contemplated by the definition of an act of racketeering in § 1961(1)(A).

[3] While the juvenile delinquency provisions of New York law are simply irrelevant to this federal prosecution, it is of course necessary to examine the Federal Juvenile Delinquency Act ("JDA"), 18 U.S.C. §§ 5031–42, which Hoo also raises as a defense to this prosecution. The JDA sets forth special procedures for federal prosecution and punishment for an act of juvenile delinquency, which is defined to be a violation of a federal law committed by a person before his eighteenth birthday. Not all acts of juvenile delinquency are subject to the restrictions of this Act, however, since jurisdiction is based on whether the person charged is a juvenile. Section 5031 states that:

> For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday....

As contemplated by this definition, a person who has committed an alleged criminal act before his eighteenth birthday may not be entitled to the protection of the JDA if criminal proceedings commence after he becomes twenty-one years old. The case law on this subject also confirms that an indictment filed after the defendant's twenty-first birthday lies beyond the jurisdiction of the JDA.

In *United States v. Araiza-Valdez*, 718 F.2d 430 (9th Cir.1980), the defendant was charged with attempting to smuggle drugs into the United States when he was 17 years old. An arrest warrant was issued but the defendant remained a fugitive for seven years. Finally, when the defendant was 24 years old, he was arrested and indicted. The Ninth Circuit held that since the Act is intended to provide a procedural mechanism for handling cases involving juveniles, the date of the indictment should determine whether a person should be prosecuted as an adult or a juvenile. *Id.* at 432. Similarly, in *United States v. Doe*, 631 F.2d 110, 112–13 (9th Cir.1980), the court held that the filing of an information before the accused person's twenty-first birthday established juvenile jurisdiction under the Act which was not defeated by an adjudication which extended beyond the time when the accused turned twenty-one. *Compare United States v. Spoone*, 741 F.2d 680 (4th Cir.1984) (acts of juvenile delinquency

dropped in an adult prosecution against a defendant less than twenty-one years old).

The indictment in this case was filed on December 27, 1984, several weeks after Hoo's twenty-first birthday. Therefore, in accordance with the principles discussed above, the acts committed by Hoo prior to his eighteenth birthday may properly be prosecuted in this court. It must also be noted, however, that under the circumstances in *Araiza-Valdez*, it was unnecessary to confront the issue of prejudicial pre-indictment delay, since the defendant as a fugitive was entirely responsible for the delay between the occurrence of the criminal conduct and his indictment. Here, however, Hoo asserts that his indictment was delayed in order to preclude him from seeking the protection afforded by the JDA.

[4] A claim of prejudicial preindictment delay is based on considerations of due process and is applicable where the defendant has demonstrated purposeful delay by the prosecutor resulting in actual prejudice to the defendant's ability to obtain a fair trial. *See Lovasco v. United States*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); *United States v. Birney*, 686 F.2d 102, 105 (2d Cir.1982).

[5] As set forth above, the delay in bringing this prosecution has resulted in Hoo's change in status from a juvenile to an adult offender. This change is not inconsequential since it at least deprived Hoo of a judicial hearing on whether it would be in the interests of justice to prosecute him as an adult rather than as a juvenile. 18 U.S.C. § 5032. *See generally Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). Since the JDA does not require a prosecution to be initiated on acts of juvenile delinquency before the defendant turns twenty-one, Hoo does not have an absolute right to the protective jurisdiction of the JDA. Nevertheless, given the apparent prejudice to Hoo, the preindictment delay would violate the Due Process Clause were it to be established that the delay was due to "unjustifiable Government conduct," *United States v. Elsbery*, 602 F.2d 1054, 1059 (2d Cir.1979), or illegitimate prosecutorial motives. *United States v. Lane*, 561 F.2d 1075, 1077 (2d Cir.1977). *See also United States v. Birney, supra*, 686 F.2d at 105 n. 1. Therefore, Hoo's request for a hearing to examine whether there was an illegitimate basis underlying the delay in filing the indictment will be granted. The hearing will be conducted on April 25, 1986 at 9:30 a.m.

II. *Motion of Wai Ho Tsang*

Among other acts, Tsang is charged with Act of Racketeering Sixty-Four which alleges a conspiracy to murder individuals in Chicago, Illinois, and the murder of William Chin. In pretrial discovery, the government disclosed that Tsang had been identified by civilian witnesses from a photographic display. The affidavit of Nancy Ryan, which recounts a conversation with Detective Joseph Carone of the Chicago Police Department, sets forth her understanding of the identification procedures undertaken by Carone and other detectives in Chicago. According to Ryan, a set of fifteen photographs were displayed to the civilian witnesses. Each of the photographs, copies of which have been submitted to the court in connection with this motion, is a black and white mug shot of a male oriental with front and profile views and a New York police department identification number. The photographs were shown to the witnesses on August 18, 1980, nine days after the Chicago shooting occurred. Tsang remained a fugitive until November, 1981, at which time he surrendered. The charges against him in Chicago were eventually dismissed.

[6] Tsang asserts here that the use of mug shots in an identification procedure was unduly suggestive and also requests a hearing to reveal any other indicia of suggestiveness. With regard to Tsang's direct attack on the mug shots, he has cited no case, and this court's research has failed to uncover any precedent, which has held that the showing of mug shots themselves demonstrates that the identification procedure

was unduly suggestive. In contrast, the only challenges to the use of mug shots which have seriously been considered are in those instances where the police photographs have been introduced as evidence or when explicit reference to them has been made before a jury. In such circumstances, given the fact that "mug-shots are generally indicative of past criminal conduct, and will likely raise the inference of past criminal behavior in the minds of a jury ..., [a]dmission of mug-shots, therefore, generally runs headlong into rules of evidence prohibiting the introduction of remarks or testimony regarding the [defendant's] bad character or past criminal record." *United States ex. rel Bleimehl v. Cannon*, 525 F.2d 414, 416–17 (7th Cir. 1975). *See also United States v. Harrington*, 490 F.2d 487, 495 (2d Cir.1973) (recommending against the introduction of mug shots except through the use of photographic duplicates without the "incriminating indicia" of criminality).

In keeping with these considerations, appropriate precautions should be taken by the prosecution at trial to avoid prejudicial references to mug shots used in a photographic display. *See United States v. Oliver*, 626 F.2d 254, 263–64 (2d Cir.1980). Nevertheless, the identification procedure itself is not tainted by their use. Moreover, the adoption by police of a lineup rather than a photographic display is neither constitutionally required, *see United States v. Boston*, 508 F.2d 1171, 1176–77 (2d Cir.1974), nor was it practically feasible since Tsang was not even in custody at the time.

Although Tsang has thus far failed to demonstrate any suggestive characteristics of the photographs used in the Chicago identification, the number and similarity of the photographs do not exhaust the possibility of suggestiveness arising from an identification procedure. Also important are any statements and indications made by the police officers when presenting the photographs for identification. *See Simmons v. United States*, 390 U.S. 377, 383–84, 88 S.Ct. 967, 970–71, 19 L.Ed.2d 1247 (1968). Tsang has not yet had an opportunity to explore these aspects of the identification. Since it is preferable to consider the possibility of suggestiveness outside the presence of the jury, *Watkins v. Sowders*, 449 U.S. 341, 345–46, 101 S.Ct. 654, 657–58, 66 L.Ed.2d 549 (1981), a brief hearing will be conducted prior to admitting any witness' identification testimony in connection with the Chicago murder.

Conclusion

For the foregoing reasons, the motions of Hoo and Tsang are denied pending further hearings.

IT IS SO ORDERED.

Norma Karleen ENGLAND, as Personal Representative of the Estate of William C. England, Plaintiff,

v.

UNITED STATES of America, Defendant.

No. 84–181–Civ-Ft.M–17.

United States District Court, M.D. Florida, Fort Myers Division.

April 14, 1986.

Survivor of decedent killed in collision with federal employee brought federal Tort Claims Act wrongful death suit against the Government. The District Court, Robert D. Morgan, J., held that seat belt defense under Florida law did not apply to bar recovery by survivor.

Judgment for plaintiff.

Automobiles ⇐226(1)

Seat belt defense under Florida law did not apply to bar recovery to survivor in

Opinion of the District Court (after hearing).

THE COURT: This hearing proceeded pursuant to the direction of the court on April 11th. The issue presented to me is whether or not Hoo has suffered prejudicial pre-indictment delay sufficient to -- I am not entirely clear what the relief would be -- I guess dismissal.

The central fact of Hoo's status has been

established. He was born on December 14, 1963, and the indictment was returned against him on December 27, 1984, 13 days after he had achieved adult status. And it is the deprivation of that status which is the issue presented today.

With respect to the hearing and the facts, they establish that a joint investigation was commenced in this matter in April of 1982, and proceeded with all the deliberate speed until January of 1984, at which time sufficient evidence had been accumulated to commence submission to the grand jury of evidence, and from January of '84 until December of '84, evidence was presented to the grand jury.

As is evident from an indictment which charges 85 acts of racketeering and a number of counts, I have forgotten how many, 85 acts of racketeering in counts 1 and 2, and then there is 3 through 12, substantive counts, and there are 25 defendants. The indictment is 90 pages long and therefore the complication of the case is evident.

As far as the defendant Hoo is concerned, he is charged in acts of racketeering 27, 29, 54, 57 and 80, and the investigation with respect to him was in progress in January of '84.

Throughout this period the government had access to, obviously through the routine reports and information,

knowledge as to his age.

The particular evidence upon which the government intends to rely with respect to act of racketeering 29 is, I think, the focus of the hearing. Act of racketeering 29 charges a conspiracy and an attempted murder in May of 1979, and obviously it is a substantial act, and while perhaps not key to the government's case, certainly it is a very significant part of the government's case.

The evidence with respect to that act was in being in January through a cooperating witness, who at that time had reached an agreement with the government to be debriefed with respect to the facts relating to act of racketeering 29, and a number of other elements in the indictment.

The debriefing agreement was the basis upon which this witness gave information to the government.

In October of '84 the government obtained certain additional evidence upon which they based its conclusion that they could file more serious charges against this particular person, who turned out to be a cooperating witness, and on the basis of these additional charges the situation was changed, and in November that witness agreed to cooperate with the government.

There was an agreement in principle, and the

matter was resolved. In fact, a cooperation agreement was signed on December 13th and on that day he entered the grand jury and gave evidence. Of course, we don't know precisely what that evidence is, but one must presume in the testimony today that the evidence related, amongst other things, to act of racketeering 29.

During this period from October until December a number of things were going on in connection with the indictment. It was in the process of drafting, which started in November, and there were additional reports that had to be submitted to the Department of Justice, one of 120 pages, which went through 10 drafts, and all of this was drawing to a head, fueled by the necessity expressed by the prosecutor that the statute of limitations deadline required the completion of the filing of the indictment in 1984. And in fact on December 27, 1984 the indictment, which has since been superseded, but basically the indictment which is now before the court was filed.

In the course of this investigation the government became aware of other evidence, aside from the evidence by the cooperating witness, that was available with respect to act of racketeering 29, and with respect to Hoo.

Also during the same period in October of '84 the government for the first time focused on the status of

the defendants who might be subject to juvenile treatment. The difference between the age limits in the federal system and the state system are the explanation for this late focusing, and in any case the information, of course, was available at all times as to which of the defendants might have been subject to the Juvenile Delinquency Act.

At no time during this period in late 1984 was there any consideration given to the effect of an indictment on Hoo's status, I mean by that there was no consideration given to whether or not he should be treated differently or achieve a different status because of his age in the investigation or in the indictment process. And there was no consideration given as to whether or not an indictment should have been returned prior to his 21st birthday, or as to whether or not there was sufficient evidence available to return the indictment which has been returned against him, prior to his 21st birthday.

The testimony here is that the evidence would have been of a different quality, and whether or not it would have been adequate was not considered, nor was there consideration given as to whether or not he could have been prosecuted in the state system.

Quite obviously he could not have been prosecuted under the RICO statute in the state system, and there was no consideration given as to whether or not a

state prosecution could have been held with respect to Hoo alone.

Now, on the facts, the issue is presented and the learned counsel have referred to the authorities, both here in this Circuit and elsewhere, and the discussion which we had prior to the hearing I think has not been dislodged in my mind, that is to say that there is a double-barreled burden here that the defendant Hoo must meet, namely actual prejudice to his right to a fair trial as a result of the delay, and an improper, whether you call it an illegitimate purpose as stated in Lawson, or a delay engineered by the government as stated in Elsberry, however you want to characterize it, it is an improper government motive with respect to the filing date of the indictment.

I should also note in the facts that have been found there is an absence of any finding that there is any prejudice to Hoo except insofar as the deprivation of the juvenile status is concerned, that is to say, there is no other loss of memory, loss of witness or anything like that that's been alleged.

I conclude that the loss of juvenile status meets the requirements of the first part of the syllogism. I conclude that Hoo has been substantially prejudiced by his inability to operate under the Juvenile Delinquency Act, and that then must lead to an inquiry as to whether or not

the government's purpose in this regard has been improper under the cases.

Having reached the conclusion that the deprivation is a clear one and a significant one, then the question is whether or not there is any direct proof of any intent to affect his status or to engineer the indictment to his detriment, and there is no such direct evidence.

What there is is evidence, which viewed in the worst light to the government, might be considered to be negligent or an omission of a requirement to consider Hoo's status.

I conclude that that does not rise to the level of a constitutional deprivation. Putting it differently, I don't believe that there is any requirement for a prosecutor to consider the status of the individual defendants with respect to the Juvenile Delinquency Act in connection with the filing of an indictment.

Here the indictment was filed without any such consideration, and in the light of all the circumstances was an entirely appropriate investigatory conduct as far as I'm concerned.

The process was not aimed at Hoo in any way, and the delay, which put the date beyond his birthday, was a combination of other responsibilities, which I have delineated, and the difficulties working out the final

arrangements with the cooperating witness.

It could, of course, as counsel for the defense indicates, have been prevented if it was necessary to do so, and it would not have been a difficult task to have done so, but it would have changed the entire structure of the indictment, and the process would have required sealing and a whole host of different elements.

Parenthetically I'm not sure that there is any reality in talking about the difference between a balancing standard and a determination which is required as to whether or not the government has an improper purpose. It seems to me you come out in precisely the same place under either standard and I conclude that the government does not have a responsibility to consider Hoo's status and they do not have a responsibilities to consider fractionating the indictment, which could, of course, have been done, but I don't think there is an affirmative constitutional duty to do that.

For those reasons I deny the motion.

Anything further?

MR. STANDIFORD: Nothing, your Honor.

THE COURT: Thanks very much.

Section 5025, added Apr. 8, 1952, c. 163, § 3(a), 66 Stat. 46, and amended Dec. 27, 1967, Pub.L. 90–226, Title VIII, § 801(b), 81 Stat. 741, related to the applicability of this chapter to the District of Columbia.

Section 5026, added Apr. 8, 1952, c. 163, § 3(a), 66 Stat. 46, provided that this chapter did not affect the parole of other offenders.

Effective Date of Repeal. Section 235(a)(1)(A) of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, as amended by Pub.L. 99–217, § 4, Dec. 26, 1985, 99 Stat. 1728, provided that the repeal of sections 5021 to 5026 shall take effect on Oct. 12, 1984.

CHAPTER 403—JUVENILE DELINQUENCY

Amendment of Analysis

Pub.L. 98–473, Title II, §§ 214(d), 235, Oct. 12, 1984, 98 Stat. 2013, 2031, as amended by Pub.L. 99–217, § 4, Dec. 26, 1985, 99 Stat. 1728, provided that, effective Nov. 1, 1987, the analysis of sections is amended by striking out the items relating to sections 5041 and 5042 and inserting in lieu thereof the following:

"5041. Repealed.

"5042. Revocation of Probation.".

§ 5031. Definitions

For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 501, 88 Stat. 1133.)

Revision Notes

Based on title 18, U.S.C., 1940 ed., § 921 (June 16, 1938, ch. 486, § 1, 52 Stat. 764).

The phrase "who has not attained his eighteenth birthday" was substituted for "seventeen years of age or under" as more clearly reflecting congressional intent and administrative construction. The necessity of a definite fixing of the age of the juvenile was emphasized by Hon. Arthur J. Tuttle, United States district judge, Detroit, Mich., in a letter to the Committee on Revision of the Laws dated June 24, 1944. Words "an offense against the" was changed to "the violation of a" without change of substance.

Minor change was made in translation of section references to "this chapter".

Editorial Notes

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, as amended, set out as a note under section 3551 of this title.

§ 5032. Delinquency proceedings in district courts; transfer for criminal prosecution

A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 841, 952(a), 955, or 959 of title 21, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State.

If an alleged juvenile delinquent is not surrendered to the authorities of a State or the District of Columbia pursuant to this section, any proceedings against him shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile fifteen years and older alleged to have committed an act after his fifteenth birthday which if committed by an adult would be a felony that is a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice; however, a juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has an an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense, or would be an offense described in section 32, 81, 844(d), (e), (f), (h), (i) or 2275 of this title, and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this subsection or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution.

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings.

Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

Whenever a juvenile transferred to district court under this section is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile shall be conducted pursuant to the provisions of this chapter.

Any proceedings against a juvenile under this chapter or as an adult shall not be commenced until any prior juvenile court records of such juvenile have been received by the court, or the clerk of the juvenile court has certified in writing that the juvenile has no prior record, or that the juvenile's record is unavailable and why it is unavailable.

Whenever a juvenile is adjudged delinquent pursuant to the provisions of this chapter, the specific acts which the juvenile has been found to have committed shall be described as part of the official record of the proceedings and part of the juvenile's official record.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 502, 88 Stat. 1134; Oct. 12, 1984, Pub.L. 98–473, Title II, § 1201, 98 Stat. 2149.)

Revision Notes

Based on title 18, U.S.C., 1940 ed., § 922 (June 16, 1938, ch. 486, § 2, 52 Stat. 765).

The final sentence of said section 922 of title 18, U.S.C., 1940 ed., was incorporated in section 5033 of this title.

Changes were made in arrangement and phraseology.

Editorial Notes

Codification. In the fourth paragraph, "that is a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21," was substituted for "punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death," instead of for "punishable by a maximum term of ten years imprisonment or more, life imprisonment or death," as directed by Pub.L. 98–473, Title II, § 1201(b)(1), Oct. 12, 1984, 98 Stat. 2150, as the probable intent of Congress.

§ 5033. Custody prior to appearance before magistrate

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer

shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 503, 88 Stat. 1135.)

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 922, 923 (June 16, 1938, ch. 486, §§ 2, 3, 52 Stat. 765).

This section consolidates said section 923, and the final sentence of said section 922, of title 18, U.S.C., 1940 ed., with such changes of phraseology as were necessary to effect the consolidation.

This revised section and section 5032 of this title were rewritten to make clear the legislative intent that a juvenile delinquency proceeding shall result in the adjudication of a status rather than the conviction of a crime.

The other provisions of said section 922 are incorporated in section 5032 of this title.

§ 5034. Duties of magistrate

The magistrate shall insure that the juvenile is represented by counsel before proceeding with critical stages of the proceedings. Counsel shall be assigned to represent a juvenile when the juvenile and his parents, guardian, or custodian are financially unable to obtain adequate representation. In cases where the juvenile and his parents, guardian, or custodian are financially able to obtain adequate representation but have not retained counsel, the magistrate may assign counsel and order the payment of reasonable attorney's fees or may direct the juvenile, his parents, guardian, or custodian to retain private counsel within a specified period of time.

The magistrate may appoint a guardian ad litem if a parent or guardian of the juvenile is not present, or if the magistrate has reason to believe that the parents or guardian will not cooperate with the juvenile in preparing for trial, or that the interests of the parents or guardian and those of the juvenile are adverse.

If the juvenile has not been discharged before his initial appearance before the magistrate, the magistrate shall release the juvenile to his parents, guardian, custodian, or other responsible party (including, but not limited to, the director of a shelter-care facility upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 504, 88 Stat. 1135.)

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 924 (June 16, 1938, ch. 486, §§ 4, 52 Stat. 765).

The words "foster homes" were inserted to remove any doubt as to the authority to commit to such foster homes in accordance with past and present administrative practice.

The reference to particular sections dealing with probation was omitted as unnecessary.

Changes were made in phraseology and arrangement.

§ 5035. Detention prior to disposition

A juvenile alleged to be delinquent may be detained only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community based facility located in or near his home community. The Attorney General shall not cause any juvenile alleged to be delinquent to be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges. Insofar as possible, alleged delinquents shall be kept separate from adjudicated delinquents. Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 505, 88 Stat. 1135.)

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 925 (June 16, 1938, ch. 486, § 5, 52 Stat. 765).

Minor changes were made in arrangement and phraseology.

§ 5036. Speedy trial

If an alleged delinquent who is in detention pending trial is not brought to trial within thirty days from the date upon which such detention was begun, the information shall be dismissed on motion of the alleged delinquent or at the direction of the court, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel, or consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered in the interest of justice. Except in extraordinary circumstances, an information dismissed under this section may not be reinstituted.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 506, 88 Stat. 1136.)

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 926 (June 16, 1938, ch. 486, § 6, 52 Stat. 766).

The words "foster homes" were inserted to remove any doubt as to the authority to commit to such foster homes in accordance with past and present administrative practice.

§ 5037. Dispositional hearing

(a) If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than twenty court days after trial unless the court has ordered further study in accordance with subsection (c). Copies of the presentence report shall be provided to the attorneys for both the juvenile and the Government a reasonable time in advance of the hearing.

(b) The court may suspend the adjudication of delinquency or the disposition of the delinquent on such conditions as it deems proper, place him on probation, or commit him to the custody of the Attorney General. Probation, commitment, or commitment in accordance with subsection (c) shall not extend beyond the juvenile's twenty-first birthday or the maximum term which could have been imposed on an adult convicted of the same offense, whichever is sooner, unless the juvenile has attained his nineteenth birthday at the time of disposition, in which case probation, commitment, or commitment in accordance with subsection (c) shall not exceed the lesser of two years or the maximum term which could have been imposed on an adult convicted of the same offense.

(c) If the court desires more detailed information concerning an alleged or adjudicated delinquent, it may commit him, after notice and hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency. Such observation and study shall be conducted on an out patient basis, unless the court determines that inpatient observation and study are necessary to obtain the desired information. In the case of an alleged juvenile delinquent, inpatient study may be ordered only with the consent of the juvenile and his attorney. The agency shall make a complete study of the alleged or adjudicated delinquent to ascertain his personal traits, his capabilities, his background, any previous delinquency or criminal experience, any mental or physical defect, and any other relevant factors. The Attorney General shall submit to the court and the attorneys for the juvenile and the Government the results of the study within thirty days after the commitment of the juvenile unless the court grants additional time.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 507, 88 Stat. 1136.)

Amendment of Section

Pub.L. 98–473, Title II, §§ 214(a), 235, Oct. 12, 1984, 98 Stat. 2013, 2031, as amended by Pub.L. 99–217, § 4, Dec. 26, 1985, 99 Stat. 1728; Pub.L. 99–646, § 21, Nov. 10, 1986, 100 Stat. 3596, provided that, effective Nov. 1, 1987, this section is amended by redesignating subsection (c) as (d) and by striking out subsections (a) and (b) and inserting in lieu thereof the following:

"(a) If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (d). After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

"(b) The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old, beyond the lesser of—

"(A) three years; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 3563, 3654, and 3565 are applicable to an order placing a juvenile on probation.

"(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old—

"(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

"(B) in any other case beyond the lesser of—

"(i) three years; or

"(ii) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult.

"Section 3624 is applicable to an order placing a juvenile under detention."

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 927 (June 16, 1938, ch. 486, § 7, 52 Stat. 766).

Reference to section establishing the Board of Parole was omitted as unnecessary.

Minor changes were made in phraseology.

§ 5038. Use of juvenile records

(a) Throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances:

(1) inquiries received from another court of law;

(2) inquiries from an agency preparing a presentence report for another court;

(3) inquiries from law enforcement agencies where the request for information is related to the investigation of a crime or a position within that agency;

(4) inquiries, in writing, from the director of a treatment agency or the director of a facility to which the juvenile has been committed by the court;

(5) inquiries from an agency considering the person for a position immediately and directly affecting the national security; and

(6) inquiries from any victim of such juvenile delinquency, or if the victim is deceased from the immediate family of such victim, related to the final disposition of such juvenile by the court in accordance with section 5037.

Unless otherwise authorized by this section, information about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege. Responses to such inquiries shall not be different from responses made about persons who have never been involved in a delinquency proceeding.

(b) District courts exercising jurisdiction over any juvenile shall inform the juvenile, and his parent or guardian, in writing in clear and nontechnical language, of rights relating to his juvenile record.

(c) During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, or others entitled under this section to receive juvenile records.

(d) Whenever a juvenile is found guilty of committing an act which if committed by an adult would be a felony that is a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, such juvenile shall be fingerprinted and photographed. Except a juvenile described in subsection (f), fingerprints and photographs of a juvenile who is not prosecuted as an adult shall be made available only in accordance with the provisions of subsection (a) of this section. Fingerprints and photographs of a juvenile who is prosecuted as an adult shall be made available in the manner applicable to adult defendants.

(e) Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture

of any juvenile shall be made public in connection with a juvenile delinquency proceeding.

(f) Whenever a juvenile has on two separate occasions been found guilty of committing an act which if committed by an adult would be a felony crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, the court shall transmit to the Federal Bureau of Investigation, Identification Division, the information concerning the adjudications, including name, date of adjudication, court, offenses, and sentence, along with the notation that the matters were juvenile adjudications.

(Added Pub.L. 93-415, Title V, § 508, Sept. 7, 1974, 88 Stat. 1137, and amended Pub.L. 95-115, § 8(b), Oct. 3, 1977, 91 Stat. 1060; Pub.L. 98-473, Title II, § 1202, Oct. 12, 1984, 98 Stat. 2150.)

§ 5039. Commitment

No juvenile committed to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges.

Every juvenile who has been committed shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment.

Whenever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home community.

(Added Pub.L. 93-415, Title V, § 509, Sept. 7, 1974, 88 Stat. 1138.)

§ 5040. Support

The Attorney General may contract with any public or private agency or individual and such community-based facilities as halfway houses and foster homes for the observation and study and the custody and care of juveniles in his custody. For these purposes, the Attorney General may promulgate such regulations as are necessary and may use the appropriation for "support of United States prisoners" or such other appropriations as he designate.

(Added Pub.L. 93-415, Title V, § 510, Sept. 7, 197 Stat. 1138.)

§ 5041. Parole

A juvenile delinquent who has been comm may be released on parole at any time under conditions and regulations as the United S Parole Commission deems proper in accord with the provisions in section 4206 of this

(Added Pub.L. 93-415, Title V, § 511, Sept. 7, 197 Stat. 1138, and amended Pub.L. 94-233, § 11, Ma 1976, 90 Stat. 233.)

Repeal of Section

Pub.L. 98-473, Title II, §§ 214(b), 235, Oct. 12, 1984, 98 Stat. 2014, 2031, as amended by Pub.L. 99-217, § 4, Dec. 26, 1985, 99 Stat. 1728, provided that this section is repealed effective Nov. 1, 1987.

EDITORIAL NOTES

Savings Provisions of Pub.L. 98-473, Title II, Parole Release Dates. See section 235 of Pub.L. 98- Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, as amended out as a note under section 3551 of this title.

§ 5042. Revocation of parole or probation

Any juvenile parolee or probationer shall be corded notice and a hearing with counsel before parole or probation can be revoked.

(Added Pub.L. 93-415, Title V, § 512, Sept. 7, 1974, Stat. 1138.)

Amendment of Section

Pub.L. 98-473, Title II, §§ 214(c), 235, Oct. 12, 1984, 98 Stat. 2014, 2031, as amended by Pub.L. 99-217, § 4, Dec. 26, 1985, 99 Stat. 1728, provided that, effective on Nov. 1, 1987, this section is amended by:

(1) striking out "parole or" each place it appears in the caption and text; and

(2) striking out "parolee or".

EDITORIAL NOTES

Savings Provisions of Pub.L. 98-473, Title II, c. II, Parole Release Dates. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, as amended, set out as a note under section 3551 of this title.